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In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. 507

CENTRAL NATIONAL BANK OF CLEVELAND,
Trustee, u/a with Edwin G. Thompson, deceased,
Petitioner,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner seeks a new trial of its case. To elevate its petition for certiorari to a false importance among the weighty causes constantly brought to this Court, petitioner presents its case as "one of high irregularity and injustice in the decision of the Circuit Court of Appeals" (Brief 16) and says that "the Circuit Court of Appeals, through procedural sleight-of-hand, has permitted the District Court to deny the petitioner its vital right of a jury verdict." (Brief 11.) Those are surprising charges. The Court of Appeals did no such thing. The case is simply one where both the District Court and the Court of Appeals have decreed that under Rule 50(b) of the Federal Rules of Civil Procedure, the defendant (here the respondent) is entitled to final judgment in its favor on its motion for judgment n.o.v. In other words, the petitioner failed to make a case.

In this case both the District Court and the Court of Appeals have agreed that there should be judgment for

the defendant. The District Court on an appreciation of the evidence held on twelve grounds that there was not sufficient evidence to justify a verdict for the plaintiff. The Court of Appeals concurred and not merely concurred in that judgment but also, in addition thereto, ordered the District Court to dismiss the action. That brings this petition for a writ of certiorari squarely within the rule set forth in *Houston Oil Company of Texas v. Goodrich*, 245 U. S. 440, which in the words of the syllabus was:

> "A writ of certiorari, if improvidently granted, will be dismissed. So *held* where the alleged errors consisted in refusing to submit certain questions to the jury in an action over the title to land, and where the rulings of the District Court depended essentially on an appreciation of the evidence and were concurred in by the Circuit Court of Appeals." (Syllabus 1.)

No sophistry or subtlety of argument, no excerpts from opinions or decrees, no references to alleged confusions, can obscure the plain, outstanding fact that both the District Court and the Court of Appeals adjudged that the evidence was not sufficient to permit judgment for the plaintiff. Why is answered by an understanding of the evidence.

The action is by the trustee-beneficiary of a life insurance policy to recover double indemnity. The single indemnity, in the amount of $25,000, was duly paid without litigation. The policy provides for payment of the extra indemnity only—

> "if death result independently and exclusively of all other causes from bodily injuries effected directly from external, violent and *accidental means* * * * except that this Double Indemnity will not be payable if the insured's death shall result * * * directly or indirectly, wholly or in part, * * * from *any violation of law* by the insured * * *." (R. 257, Pltf's. Ex. 5.)

The undisputed or established facts clearly showed that the insured's death did not result from accidental

means and, further, that it did result from violations of law by the insured.

The insured, known as "Tex" Thompson, while hiding out at a ranch near Albuquerque, New Mexico, from not only civil but also criminal proceedings in Cleveland, Ohio (39-41, 277; 136, 142, 94, 98, 215-216) had an affair with the wife of Bryson Corbett (84-87, 137, 216-217), resulting in their being separated (287, 86, 136, 156, 52) and a divorce proceeding being filed. (52, 104, 140.) In addition he had brutally beaten up Corbett (75-76, 136-137) who had an arrested case of tuberculosis. (129-130.) Thereafter, on learning that Corbett planned to sue him for alienation of affections (97), Thompson went to Corbett's employer, Clinton P. Anderson (who now is Secretary of Agriculture), and asked Mr. Anderson, who employed Corbett as an insurance agent, either to fire Corbett or to tell Corbett to give his wife a divorce. (90.) Mr. Anderson offered to bring Corbett in to discuss the situation but Thompson, in the words of Mr. Anderson, "expressed only going out to slap him (Corbett) until he saw the thing in the right light." (91.) That afternoon, August 23, 1935, from his hotel room where he and Corbett's wife had lunch (49), Thompson in a loud and angry voice (112, 146, 219) telephoned Corbett (110) at Corbett's home that he was coming out there and beat him up. (147.) Corbett warned him that he, Thompson, had done it once before and would not get a chance to do it again; that he, Corbett, had a gun and that if Thompson came out there he, Corbett, would shoot him. To this Thompson's reply was "You ——— ——— ——— ——— son of a ———, you haven't got guts enough to shoot me or anybody else." Corbett again warned him that "if you come out here I will shoot," and hung up. (146-147, 112, 49-50, 219.)

After the call, Corbett was "very much worried and didn't know what to do." (147.) He telephoned his attorney, Ralph Brown, for advice. His attorney told him he did not have to leave his home but to stay there and to be

prepared to defend himself. (99-102, 147.) Then Corbett, who was alone in this house (146, 196) where he roomed (142, 149), and who as aforesaid had arrested tuberculosis, attempted unsuccessfully to reach by telephone a husky friend of his. (147-148.)

After the aforesaid telephone call by Thompson to Corbett, Thompson was warned by Mrs. Corbett (218-219) and also by two police officers. (114, 120.) Mr. Anderson, also, that morning, had warned Thompson "that he (Thompson) had beaten him (Corbett) once and (that) Corbett said that if he came back to do it again he would shoot him." (91.)

Notwithstanding the repeated warnings (288) Thompson, in accordance with his telephoned threat, went to Corbett's home. There, without ringing the doorbell, knocking, or other form of salutation (149-150, 233), he opened the door of the front porch. That front porch was screened in, carpeted, furnished (149, 208, 247, 270, 275) and used as "living quarters" of the house. (149, 208.) He entered. He latched the door. He faced Corbett. (150.) And this is what then happened according to the only testimony in the record:

> "Q. What did you do then? A. Well, as he turned and faced me I pulled up and shot.
>
> Q. And where did that shot go, if you know? A. I have no way of knowing where the bullet went. I know it went—he turned his head like this and it gave me the impression that the bullet must have gone to the left of the side of his head.
>
> Q. What did he do then? A. Well, he looked a little surprised and at the same time he didn't throw up his hands and ask—
>
> Mr. Harrison: You say he did or did not?
>
> A. He did not throw up his hands in the effect of yelling 'Quits,' or he didn't shout out or do anything, but he just looked like he was going to try to make some kind of pass at me from there; I don't know what.

Q. What did you do then? A. Well, I suddenly realized the man wasn't going to stand there and let me shoot at him, and if he didn't yell quits or anything like that I would have to hit him. So, I pulled up a second shot, cocked the gun and took deliberate aim, shot from high shoulder shot.

Q. And where did you hit him? A. I would say approximately in the position about here (indicating).

Q. And then—the witness is pointing, for the record, at a point in the high chest about three inches below the shoulder on the left side.

Q. What happened to Thompson then? A. It was very obvious that the bullet had hit him and knocked him back two or three steps and you could see the impression of the bullet as it hit forcibly between his shoulders and he grabbed himself with his hand and he sort of staggered and, at the same time, from his sounds, as though he were fighting for his breath, and he started staggering over towards this wicker chair. I think he tried to land on the chair and missed the chair and fell down behind it, and as he fell down behind the chair my gun just kept—I was so nervous and excited the gun just went off. I don't know how many more times it was shot.

Q. I show you a photograph marked 'Plaintiff's Exhibit 14' and ask you if this wicker chair in the corner on the right hand side is the chair you speak of? A. That is right.

Mr. Harrison: Where was the chair then?

The Witness: The chair was approximately in the position of this now except as to the angle.

Mr. Jamison: Let the record show the witness is pointing to the chair on the left, the first chair inside the door. The witness pointed here. The wicker chair he mentioned was on this side where this chair is located here." (150-152.)

Corbett was tried in New Mexico for homicide and was acquitted on a directed verdict. (152.) He testified in this action which plaintiff instituted in Cleveland rather than in New Mexico, where the witnesses lived.

The foregoing are the facts disclosed by the record, an examination of which by the Court we respectfully solicit. They are not simply our interpretation of them.

The evidence thus presents a situation where an insured, hiding from legal proceedings in Cleveland Ohio, violates the sanctity of Corbett's home, alienates the affections of Corbett's wife, beats up Corbett, attempts to have Corbett discharged from his employment, is warned by Corbett's wife, by Corbett's employer, and by the police to keep away from Corbett's home, but nevertheless he entered Corbett's dwelling and was shot and killed. Sordid in every respect.

Yet the plaintiff claims the death resulted from accidental means and did not result either directly or indirectly from violation of law.

Petitioner's review of the previous orders and proceedings in this case is also both inaccurate and incomplete. We shall point out the necessary additions and corrections thereto when in our argument we analyze them, and so at this point will only outline such history, proceeding chronologically.

First trial.

Upon the first trial, before Judge Paul Jones, the jury disagreed and was discharged. (316.)

Second trial.

Upon the second trial, before Judge Samuel West, at the close of all the evidence defendant moved for a directed verdict upon two grounds, namely:

(1) That plaintiff had not shown death by "accidental means," and

(2) That plaintiff had not shown absence of "violation of law" by the insured.

Judge West found the first ground sufficient, ruled "that it cannot be said that he met his death by accidental means" (9), and upon a directed verdict granted on that

ground alone rendered judgment for defendant. *The court did not pass upon the second ground, whether insured was violating the law when he met his death.* (9, 287.) (Petitioner omits this fact.) This is of significance, as will appear later in this brief.

First appeal.

Plaintiff then appealed to the Court of Appeals. That Court, Judges Allen, Hamilton and Arant, in an opinion by her Honor Judge Allen, reversed and remanded for a new trial, holding that there were three issues under the accidental-means question which should have been submitted to the jury. "The opinion," as Judge Hicks later said, "went no further." (318.) *Central Nat. Bank of Cleveland vs. General American Life Ins. Co.*, 105 F. 2nd 878. (Opinion, at 11; mandate, at 10.) Defendant filed a petition for rehearing, which was denied.

Defendant then filed a petition for certiorari, which also was denied. *General American Life Insurance Co. vs. Central National Bank of Cleveland*, cert. den. 308 U. S. 605, Oct. Term, 1939, No. 420.

Third trial.

The third trial was before a third judge, Judge Robert Wilkin. In advance of trial defendant prepared its motion for directed verdict on twelve grounds. Nos. 1 and 2 were based upon burden of proof. Nos. 3, 4, 5, 6, 7 and 8, carefully following the opinion of the Court of Appeals, presented six specific issues under the accidental means question. Any one of those, if found in defendant's favor, would entitle it to judgment under the principles of law which the Court of Appeals had declared governed that question. All six were outside of the scope of the three narrow accidental-means issues which were in terms discussed and decided on the former appeal. Nos. 9, 10, 11 and 12 were with respect to the violation of law question, each being based upon a different New Mexico criminal statute claimed to have been violated by the insured. Thus,

at least Nos. 3 to 12, inclusive, were outside of the questions "in terms discussed and decided" by the Court of Appeals upon the first appeal. (Discussed further *infra*, 22-32.)

At the close of all the evidence, defendant made its motion for directed verdict on such twelve grounds. (236-37.) The motion was overruled and the case sent to a jury, which thereafter brought in a verdict for plaintiff upon which judgment was entered. (17.)

Defendant then filed an alternative motion under Rule 50(b) for judgment n.o.v. or for a new trial. (283.) The twelve grounds above described were assigned in support of the motion for judgment. In the language later used by the Court of Appeals, "The grounds advanced for a new trial were, (1) that the motion for a directed verdict should have been sustained; (2) that the verdict was contrary to the evidence and the law and was not supported by any evidence and was against the weight of the evidence * * *." (317.) (We omit additional grounds, and it will be understood that reference is not made to such omitted grounds in the statements following.)

Judge Wilkin overruled the motion in both branches (289) upon the ground that "to enter a judgment for defendant in spite of the verdict for the plaintiff, or to order a new trial for the reasons assigned, would not be consistent with the opinion of the court of appeals. For that reason the motion is overruled." (287.)

How did Judge Wilkin view the evidence and its legal significance? The following excerpt from his opinion leaves no room for doubt. He stated:

> "As to the question of accidental means, the views of this court were expressed by Judge West and were overruled by the court of appeals. There is no occasion for this court to say anything further upon that subject; any comments now would be out of place.
>
> "On the other point, however, as to the question whether the insured was engaged in unlawful conduct

at the time he met his death, the views of this court were not expressed at the former trial and it seems that they might now be respectfully presented. Counsel and the reviewing court, if the case is again appealed, are entitled to the views of the trial court on that issue.

"It is the opinion of this court that the undisputed or established facts reveal that the insured was in an unlawful enterprise at the time of his death. The insured had alienated the affections of Corbett's wife. He had severely beaten Corbett. Corbett's attorney had sent the insured a letter which the insured considered as a threat of suit and he dreaded the consequent publicity. The insured called Corbett at his home and said he wished to talk with him, that he wanted to see him. Corbett replied that he did not want to see the insured and directed him to his attorney. Corbett testified that the insured said he was coming out to beat him up and that he told the insured that he would not get a chance to do it again; he said he would shoot the insured if he came out to his home. The testimony of Corbett on this point was corroborated by the testimony of other disinterested witnesses: the hotel maid, Miss Hughes, and the officers at the police station. The insured was forbidden by Corbett and advised by others not to go to the home of Corbett. This is shown by the testimony of Corbett, Mr. Anderson, the police officer, and Miss Hughes. There is evidence that the insured was highly wrought, angry, abusive, and profane. In spite of all admonition, he went to Corbett's home and as he entered through the door of the enclosed porch he was shot and killed.

"Certain statutes of New Mexico were offered in evidence which show that the action of the insured was contrary to the express provisions of the law of that state. It would seem to this court, moreover, that the conduct of the insured was contrary to more general principles of law. His going to the home of Corbett in the circumstances was a violation of Corbett's right of privacy and an invasion of the sanctity of his home.

"The plaintiff contended that the inference was justified that the insured went to Corbett's house to have a peaceful talk about the differences between them. But he had no right to insist upon even that kind of talk in view of Corbett's refusal to see him. It seems to the court that he was a trespasser when he entered the premises of Corbett's home." (287-89.)

Second appeal—first hearing.

Defendant then appealed to the Court of Appeals where the case was heard by Judges Hicks, Simons and Allen, with the opinion (316) being written by Judge Hicks. *General American Life Ins. Co. v. Central Nat. Bank of Cleveland,* 136 F. 2d 821.

In Judge Hicks' opinion, after reviewing the previous proceedings in the case, he said:

"The appeal is from the final judgment and from the order overruling the motion to set aside the verdict and enter judgment for the defendant, or, in the alternative, to order a new trial. In this condition of the record, this court may affirm or reverse the action of the lower court and enter judgment n.o.v., or reverse and remand for a new trial. *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 254. The District Court was required to rule not only upon the motion for judgment n.o.v. but also upon the motion for a new trial. In overruling the motion for new trial, the District Judge was required to give his reason therefor. See *Montgomery Ward & Co. v. Duncan, supra* (p. 253). He gave his reasons in no uncertain terms." (317.)

Judge Hicks then continued, with reference to the limits of the court's previous decision, as follows:

"As indicated above, the gist of our former opinion was, that 'the case presents several questions of fact which required submission to the jury; * * *.' The opinion went no further. See *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551, 553; *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 136. It is apparent that the view of the lower court was that our former opinion required it not only to overrule the motion for judg-

ment n.o.v., but the motion for a new trial as well. This was erroneous." (318.)

After quoting from decisions concerning motions for new trials, Judge Hicks continued:

"Appellant was entitled to have the court pass upon the motion for a new trial in the exercise of its own independent judgment. This it has not had. It 'is entitled to have the court below weigh all the evidence, and exercise its discretion to see whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted, * * *' *Felton v. Spiro, supra,* (p. 583). As pointed out in *Montgomery Ward & Co. v. Duncan, supra,* it is also entitled to have the court determine whether or not it should have a new trial upon any other ground set forth in its motion therefor.

"For this purpose the case must be remanded, with directions to the court below to consider and act in its own discretion upon appellant's motion for a new trial, stating the reasons for his action. The result, whether one way or the other, may be certified to us in a supplemental record, and, along with other uncontroverted issues in the case, will be subject to review here under the procedure outlined in *Montgomery Ward & Co. v. Duncan, supra.* We are not unmindful that an appellate federal court will not ordinarily disturb the action of a district court upon a motion for a new trial for error of fact (*Paramount* [*Fairmount*] *Glass Works v. Coal Co.*, 287 U. S. 474, 481) but this is not true where the question involved is one of law.

"Remanded." (319.)

The mandate of the Court of Appeals to the District Court (303) upon this intermediate remand is not in the record.

Second appeal—intermediate remand.

After receipt of the mandate Judge Wilkin considered again the defendant's alternative motion of November 4, 1940, and rendered an opinion as follows:

"WILKIN, *J.*:

"In compliance with the mandate of the Court of Appeals under date of June 22, 1943, this court considers again the defendant's motion of November 4, 1940 for judgment *non obstante veredicto* or, in the alternative, an order for new trial, and now sustains the same on all twelve grounds of the first alternative of the motion; and on grounds 2, 3, 4, 6, 7 of the second alternative; viz., that the evidence is insufficient to entitle the plaintiff to the relief sought or to any relief; that the verdict is contrary to the evidence; is against the weight of the evidence; and contrary to the law. The other grounds of the motion are found to be not true and are overruled.

"In view of the conclusions of this court, and especially the holding that the undisputed evidence or established facts show that the insured at the time of his death was engaged in a violation of law (both the statutes of New Mexico and the fundamental principles of self-defense and defense of one's home—see memorandum opinion of this court May 5, 1941),[1] which violation defeated the benefits sought under the policy, it would be futile to order a new trial; so the court therefore grants the first alternative relief, sets aside the verdict and gives judgment for the defendant *non obstante veredicto*. Except for that judgment an order for new trial would be made.

"Copy hereof ordered certified to the United States Circuit Court of Appeals in a supplemental record as per opinion of that court of June 22, 1943.

R. N. WILKIN,

"August 20, 1943. *Judge.*

"[1] For a general discussion of the principles referred to, see *People v. Tomlins*, 213 N. Y. 240, 243; 107 N. E. 496, and authorities cited." (302.)

It was in the *Tomlins* case, cited by Judge Wilkin in the footnote, that Judge Cardozo said:

"The homicide occurred in the defendant's dwelling. It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If

assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home * * *. Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home."

Thereafter, by brief, plaintiff further argued its position. (303.)

Subsequently Judge Wilkin entered a formal order (307) in which he ruled that "the twelve grounds of the motion for judgment are well taken" (naming them) and that "grounds 2, 3, 4, 6 and 7 of the alternative motion for new trial" are well taken (naming them). In accordance with his finding that plaintiff had no case and that "it would be futile to order a new trial" (302), Judge Wilkin then made the following orders appropriate to that situation. He—

1. Set aside the verdict for plaintiff;
2. Set aside the judgment for plaintiff;
3. Set aside his order of July 25, 1941, which overruled defendant's alternative motion;
4. Granted defendant's motion for judgment n.o.v.;
5. Conditioned upon the foregoing judgment for defendant being reversed upon appeal, granted defendant's motion for a new trial; and
6. Ordered the proceedings since receipt of the mandate certified back to the Court of Appeals in a supplemental record in the same appeal case.

The foregoing parts of his order were, in full, as follows:

"It is Therefore Ordered and Adjudged:

"1. That the verdict and judgment for plaintiff heretofore rendered in this cause on October 24, 1940, and the order rendered in this cause on July 25, 1941, overruling the motion of the defendant to set aside the verdict and judgment theretofore entered and to enter judgment for the defendant, or, in the alternative, to order a new trial be, and each of them hereby is, vacated and set aside.

"2. That defendant's motion for judgment *non obstante veredicto* filed November 4, 1940, be, and the same hereby is, granted, and judgment in this cause is hereby rendered for the defendant. Costs are adjudged against the plaintiff.

"3. Subject to the condition that the order for new trial shall become effective only if the foregoing judgment for defendant should be reversed on appeal, defendant's alternative motion of November 4, 1940, for a new trial is granted and a new trial is ordered.

"4. The proceedings in this court subsequent to the receipt of said mandate of the Court of Appeals, including this order and the memorandum opinion of this court, filed August 21, 1943, are hereby ordered certified to the United States Circuit Court of Appeals for the Sixth Circuit in a supplemental record in said Case No. 9287 in accordance with the opinion of that court of June 22, 1943." (309-10.)

Second appeal—second hearing.

After the case was returned to the Court of Appeals in accordance with its order, the case was argued again (320) before the same judges who heard the first hearing of the appeal, namely, Judges Hicks, Simons and Allen; and each party filed another (its third) brief in the appeal.

Upon a full review of the record, including the supplemental transcript, the Court of Appeals, without opinion, rendered judgment as follows:

"This cause was heard upon the transcript of record, including the supplemental transcript filed May 7, 1945, briefs and re-argument of counsel; and it appearing that the judgment of the District Court, entered pursuant to the mandate, issued July 30, 1943, is equivalent in substance to the granting of a new trial for the reasons and upon the grounds set out in the memorandum opinion of the District Court filed August 21, 1943, and in the order of the court based on the memorandum entered November 2, 1944; and the court being of the opinion that there is no reversible error in the action of the court in vacating and setting aside the judgment appealed from,

> IT IS THEREFORE ORDERED AND ADJUDGED, that the judgment for plaintiff be and the same is reversed and the case remanded with directions to the District Court to dismiss the action." (320.)

Thus the Court of Appeals expressly affirmed the District Court "in vacating and setting aside the judgment (for plaintiff) appealed from" and in addition, and independent of the final judgment for defendant rendered by the District Court, found that defendant was entitled to final judgment in its favor and so ordered by remanding "with directions to the District Court to dismiss the action." Under Rule 41(b), Federal Rules of Civil Procedure, such a dismissal "operates as an adjudication upon the merits." (See *infra*, at 48.)

No petition for rehearing in the Court of Appeals was filed by petitioner.

ARGUMENT.

Summary of the Argument.

Petitioner's first point is that the District Judge exceeded "the bounds of the limited mandate" when upon remand it, this time, granted defendant's motion for judgment n.o.v. and rendered final judgment for the defendant. (Brief 10.) That point cannot be supported on the present record for that mandate is not in the record. If it is assumed that the mandate was in the usual form, however, and in the terms indicated by the opinion, what was remanded was "the case." The remand operated to reinstate the proceedings in the trial court as of the date it originally passed upon defendant's motion. The mandate did *not*, as petitioner states (Brief 4), expressly limit the trial court to passing "only" on the motion for new trial. Defendant was entitled to have the trial court exercise its discretion upon the motion for judgment n.o.v. (*Montgomery Ward & Co. v. Duncan*, 311 U. S. 243) and its previous ruling thereon, made when it erroneously assumed it had

no authority to grant it, was the equivalent of no ruling thereon at all (*Fairmount Glass Works v. Coal Co.*, 287 U. S. 474). Since the Court of Appeals had not passed upon the motion for judgment n.o.v., the District Court was entitled to correct its former order to avoid injustice (*Supervisors v. Kennicott*, 94 U. S. 498). Further, since it was essential that the trial court exercise its discretion thereon before such exercised-discretion could be reviewed by the Court of Appeals, its passing thereon was necessary in aid of the appellate jurisdiction of the Court of Appeals. Power to rule on the motion for new trial carried with it power to rule on the motion for judgment n.o.v., for disposition of the latter was necessary before ruling on the former, which was an alternative. Where the District Court under such circumstances is of such clear opinion that plaintiff has failed to make a case, it is not confined to ordering a new trial but may grant final judgment to the defendant.

Petitioner's second point is that the Court of Appeals, in the order appealed from, only affirmed and ratified the action of the District Court in rendering judgment n.o.v. As heretofore pointed out, that allegation is at variance with the facts. The Court of Appeals did more than affirm and ratify the action of the District Court. It independently ordered the action dismissed. This the Court of Appeals had authority to do (*Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254). So even if it be assumed that the District Court committed error, its action was superseded by the final judgment of the Court of Appeals, the authority of which to make such independent disposition of the case the petitioner does not challenge.

Petitioner's third and last point amounts to the claim that the second-appeal decision of the Court of Appeals is, in petitioner's opinion, inconsistent with its decision on the first appeal. But even if such inconsistency is assumed to exist, the Court of Appeals was not without power to

reach a decision inconsistent with its decision on the first review of the case (*Messenger v. Anderson,* 225 U. S. 436). However, the second appeal presented ten issues not previously determined, any one of which ten new issues could have been conclusive against petitioner. Also, the evidence on the third trial was quite different in important respects from the factual situation set forth in the first-appeal opinion.

In order to discuss petitioner's points in the order in which they arose, we shall discuss its third point first and then its first point and its second point.

A.

NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT WAS PRECLUDED BY THE FIRST-APPEAL DECISION FROM RENDERING FINAL JUDGMENT FOR RESPONDENT UPON ITS MOTION FOR JUDGMENT N.O.V.

1. The Court of Appeals was not without power on the second appeal to hold as it did, even assuming that decision to be inconsistent with its first-appeal decision.

One of petitioner's grounds for certiorari is that the Court of Appeals was guilty of "high irregularity" because, in petitioner's opinion, there is "inconsistency" between the first-appeal decision and its final judgment on the second appeal, since on the first appeal it decided that "certain" disputed issues be submitted to the jury whereas after the final hearing of the second appeal it dismissed the action. (Brief, 16.) Without concreteness or definiteness, the petitioner argues as if there were some law of the case that forbade such action. (Brief, 7.) The statements petitioner makes as to what the Court of Appeals decided by its first-appeal decision leave out important qualifications thereof and so present a distorted representation. But assume that what petitioner says is accurate, we sub-

mit there is no "law of the case" that forbids the Court of Appeals from doing just what it did do.

Before refuting petitioner's position on other grounds, we wish to meet head-on, and to refute, the law of the case aspect of its argument; the proposition that, assuming the issues and the evidence on the third trial were exactly the same as on the second trial, the Court of Appeals had no power to reach a result inconsistent with its first-appeal decision.

In *Messenger v. Anderson,* 225 U. S. 436, at 444, Mr. Justice Holmes said:

> "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

Accord: *Chase, Jr., v. United States,* 256 U. S. 1, 9-10; *Southern Ry. Co. v. Clift,* 260 U. S. 316, 319; *Rooker v. Fidelity Trust Co.,* 261 U. S. 114, 118. See *Diaz v. Patterson,* 263 U. S. 399, 402.

The Courts of Appeals, following *Messenger v. Anderson, supra,* have many times and in a variety of situations held or asserted that their own decision on one appeal does not limit their power on a second appeal in the same case to reopen what they have decided. Among such cases are the following:

Sixth Circuit: *Chesapeake & O. R. Co. v. McKell,* 209 F. 514, 516; *Franc, Strohmenger & Cowan, Inc. v. Forchheimer,* 32 F. 2d 696, 697; *Lawrence-Williams Co. v. Societe Enfants,* 52 F. 2d 774, 776; *Reynolds Springs Co. v. L. A. Young Industries,* 101 F. 2d 257, 259.

First Circuit: *Cochran v. M. & M. Transp. Co.,* 110 F. 2d 519, 521; *White v. Higgins,* 116 F. 2d 312, 317.

Second Circuit: *Johnson v. Cadillac Motor Car Co.,* 261 F. 878, 886; *Higgins v. California Prune & Apricot*

Grower, Inc., 3 F. 2d 896, 898; *Hammond-Knowlton v. United States*, 121 F. 2d 192, 205; *Perrone v. Pennsylvania R. Co.*, 143 F. 2d 168, 169; *York v. Guaranty Trust Co.*, 143 F. 2d 503, 518.

Fifth Circuit: *Seagraves v. Wallace*, 69 F. 2d 163, 164; *Atchison, T. & S. F. Ry. Co. v. Ballard*, 108 F. 2d 768, 772.

Eighth Circuit: *Pennsylvania Mining Co. v. United Mine Workers*, 28 F. 2d 851, 852-53; *Rogers v. Chicago, R. I. & P. Ry. Co.*, 39 F. 2d 601, 604; *Page v. Arkansas Natural Gas Corp.*, 53 F. 2d 27, 31; *Western Fire Ins. Co. v. University City*, 124 F. 2d 698, 699-700.

Ninth Circuit: *Electrical Research Products v. Gross*, 120 F. 2d 301, 308.

Court of Appeals, District of Columbia: *Davis v. Davis*, 96 F. 2d 512, 515.

Discussing re-examination of its own decisions by an appellate court, in *Seagraves v. Wallace*, 5 Cir., 69 F. 2d 163, at 164, Sibley, Circuit Judge, said:

> "An appellate court, so long as it has jurisdiction over the controversy, ought to have power to do justice according to law, and should be more ready to correct its own previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency. The court is not bound at the will of litigants to revise its previous holdings, but, when itself convinced that it should, it can. It may say not *stare decisis* but *fiat justitia, rual coelum.*" (25 *C. J.* 1086, n. 63, translates this as "A maxim meaning 'Let justice be done, though the heaven should fall.' ")

In *White v. Higgins*, 1 Cir., 116 F. 2d 312, 317, Magruder, Circuit Judge, pointed out:

> "When the doctrine of law of the case is being invoked in an intermediate appellate court, such as the Circuit Court of Appeals, another consideration enters. After we affirm a judgment on the ground that

> our decision on an earlier appeal has become the law of the case, the Supreme Court is nevertheless free to take the case on certiorari and reverse our judgment. * * * Our law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case. This being so, it would seem that if on second appeal we thought our earlier opinion was erroneous, we ought sensibly to set ourselves right, rather than to invite reversal above."

So taking at its face value petitioner's assertion that the final judgment of the Court of Appeals is inconsistent with its first-appeal decision, that proves neither that the Court of Appeals was without power to render that judgment nor that such judgment was, on its merits, erroneous.

2. The District Court was free to grant respondent's motion for judgment n.o.v. upon any of the assigned grounds which had not in terms been decided by the Court of Appeals in the first-appeal opinion.

Respondent's motion for judgment n.o.v. was carefully drafted so as to present grounds not in terms decided by the Court of Appeals upon the first appeal. Was the District Court entitled to grant the motion and to render final judgment for defendant upon finding any one of such grounds well taken? Clearly it was, as the following decisions of the Court show:

In *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551, 553, it was held:

> "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require reversal of the judgment, it may order a reversal without entering into any

inquiry or determination of other questions. While undoubtedly an *affirmance* of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows *in case of a reversal.* It is impossible to foretell what shape the second trial may take or what questions may then be presented. *Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.*" (Emphasis ours.)

Accord: *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 136; *Wolff Packing Co. v. Court of Industrial Relations,* 267 U. S. 552, 562; *Taenzer & Co. v. Chicago, R. I. & P. Ry. Co.,* 6 Cir., 191 F. 543, 547-48, cert. dismissed 223 U. S. 746.

In *General Inv. Co. v. Lake Shore Ry. Co.,* 260 U. S. 261, 284, the question arose whether a ruling upon an appeal that a case is sufficient in one respect precludes the lower court after remand from ruling that the case is insufficient in other respects, and it was held:

"*Effect of decision on first appeal.*

"The plaintiff takes the position that the partial reversal on the first appeal amounted to an adjudication of the *sufficiency* of so much of the bill as fell within the reversal and that the District Court could not thereafter treat its sufficiency as an open question. This position is not tenable. The reversal was put on the ground that the District Court had erred in holding in respect of that part of the bill that the New York Central Company was an indispensable party. *Whether that part was rightly subject to other objections, such as afterwards were advanced in the second motion to dismiss, was neither discussed nor decided on that appeal.* The opinions delivered on the two appeals make this plain. In that situation it was quite admissible for the District Court, after the case was returned to it, to examine and pass on the objec-

tions presented in the second motion, and was likewise admissible for the Circuit Court of Appeals to consider them on the second appeal. *Mutual Life Insurance Co. v. Hill,* 193 U. S. 551, 553. And see *Messenger v. Anderson,* 225 U. S. 436, 444." (Emphasis ours.)

3. Respondent's motion for judgment n.o.v. assigned six grounds under the accidental-means question which in the first-appeal opinion were not decided; and the District Court was therefore empowered to grant that motion upon any one of such six grounds.

The Court of Appeals' judgment is not, however, inconsistent with its first-appeal opinion for on the accidental-means question alone (the violation of law issues are later discussed) respondent's motion for judgment n.o.v. presented six issues which were not, in the District Court, foreclosed by the first-appeal decision. Indeed, in accordance with the first-appeal opinion itself, findings favorable to defendant on any one of such six factual situations, all of which were clearly established, required judgment for the defendant for failure to show the insured's death resulted from accidental *means.*

Discussion of this point unavoidably requires an accurate presentation of (1) the governing general principles set forth in the opinion on the first appeal, (2) "the questions in terms * * * *decided" (Mutual Life Ins. Co. v. Hill, supra),* and (3) grounds Nos. 3, 4, 5, 6, 7 and 8 of respondent's motion for judgment n.o.v.

For brevity and facility of exposition we shall quote the court's statements of the governing general principles and then by footnotes show how grounds Nos. 3, 4, 5, 6, 7 and 8 of respondent's motion for judgment n.o.v. were predicated thereon.

In the first-appeal opinion her Honor, Judge Allen, after stating the case, continued as follows (emphasis is ours):

"An injury of this kind is not considered accidental where the insured *brings about* the assault upon himself by his own wrongful act,[1] or where, under such circumstances that he would naturally be presumed to know that the injury *is likely* to be inflicted, he voluntarily incurs an obvious hazard of this character,[2] or *places himself in a position* where it may be reasonably expected that he will be assaulted.[3] *Occidental Life Ins. Co. v. Holcomb*, 10 Fed. (2d) 125 (C.C.A. 5); *Isoard v. Mutual Life Ins. Co. of N. Y.*, 22 Fed. (2d) 956 (C.C.A. 8); *Taliaferro v. Travelers' Protective Assn. of America*, 80 Fed. 368 (C. C. A. 8); *McCrary v. New York Life Ins. Co.*, 84 Fed. (2d) 790 (C.C.A. 8).

"Conversely, where the insured is intentionally injured by another and the injury is *not the result of misconduct or an aggression by the insured*, but is unforeseen insofar as he is concerned, the injury is accidental within the meaning of the usual accident policy provision. *Employers' Indemnity Corp. v. Grant*, 271 Fed. 136 (C. C. A. 6); *New York Life Ins. Co. v. Murdaugh*, 94 Fed. (2d) 104 (C. C. A. 4); *Mutual*

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[1] The court's statement enunciates *the actual causation* test of accidental means; whether, whatever his actual or reasonable expectation was, the insured produced the situation. Ground No. 3 of respondent's motion for judgment n.o.v. was:

"(3) That the evidence shows that Thompson brought about the shooting by a wrongful act or wrongful acts." (R. 283.)

[2] The court's statement enunciates the test of *the insured's presumed knowledge of danger*, his probable belief that injury "is likely." Ground No. 4 of respondent's motion was:

"(4) That the evidence shows that Thompson went to the Telfer house under such circumstances that he would naturally be presumed to know that he was likely to be injured by gunshot." (283.)

[3] The court's statement enunciates *the going in dangerous position test*; whether the insured, regardless of intentions which were peaceable or otherwise, voluntarily incurred substantial physical *risk*. Ground No. 5 of the motion was:

"(5) That the evidence shows that Thompson by going to the Telfer house under the circumstances then existing, placed himself in a position where it would reasonably be expected that he would be shot at." (283.)

Life Ins. Co. of N. Y. v. Sargent, 51 Fed. (2d) 4 (C. C. A. 5).

"The question, then, is whether this record contains substantial evidence that the shooting was not foreseen by Thompson, that it would not have been *foreseen by a man of ordinary intelligence and prudence*,[4] and that Thompson was not *the aggressor*.[5] "

After discussing the evidence on that trial, the opinion then ruled:

"The case presents *several* questions of fact which required submission to the jury: (1) Whether Thompson went out to assault Corbett, or to have a peaceful *talk* with him over the threatened lawsuit; (2) whether he *expected* Corbett to shoot him; (3) whether a reasonable man under all of these circumstances would have *expected* to be shot. *Mutual Life Ins. Co. of N. Y. v. Sargent, supra; Employers' Indemnity Corp. v. Grant, supra; New York Life Ins. Co. v. Murdaugh, supra.* A jury might have found either that Thomp-

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[4] The court's statement enunciates *the ordinary foresight test*, what a reasonable man would have foreseen. Ground No. 6 was:

"(6) That the evidence shows that a man of ordinary intelligence and prudence, acquainted with the circumstances as shown by the evidence, would have foreseen that the shooting of Thompson was likely to result from Thompson's going to the Telfer house." (283.)

As Judge Wilkin said (288), Mr. Anderson, Corbett, Mrs. Corbett, Norfleet and Dugan, five persons, warned the insured beforehand on the basis of *actual* foresight—foresight which came true.

As will be noted, none of those first four principles relate to or depend upon the insured's reason for taking such risk.

[5] The court's statement enunciates *the aggressor doctrine*; whether the injury is the result of misconduct or an aggression by the insured. Ground No. 7 was:

"(7) That the evidence shows that Thompson was the aggressor in the situation which resulted in the shooting." (283.)

It will be remembered that *it was not Corbett who hunted up Thompson*. It was Thompson who hunted up and forced himself upon Corbett—even to the extent of entering his home in the face of Corbett's express warning that he would be shot if he came there.

son was or was not the aggressor, that Thompson was or was not *aware of the danger*,[6] and that a reasonable man might or might not have anticipated the result." (12-14.)

Thus it *was* perfectly consistent with the opinion of Judge Allen on the first appeal thereafter to enter judgment for defendant upon finding *any one* of those six grounds well taken, provided such issue was not "in terms discussed *and decided*" (*Mutual Life Ins. Co. v. Hill, supra,* at 20-21) in that opinion.[7]

Did that opinion "decide" those six issues? The answer is in the negative, for the opinion in terms decided only the following three narrow issues, to-wit:

> "The case presents *several* questions of fact which required submission to the jury: (1) Whether Thompson went out to assault Corbett, or to have a peaceful *talk* with him over the threatened lawsuit; (2) whether he *expected* Corbett to shoot him; (3) whether a reasonable man under all of these circumstances would have *expected* to be shot." (Emphasis ours.) (14.)

And it was so held by that court when, in its opinion following the first hearing of the second appeal, Judge Hicks said:

> "As indicated above, the gist of our former opinion was, that 'the case presents *several* questions of fact which required submission to the jury; * * *' *The opinion went no further.* See *Mutual Life Ins. Co. v.*

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[6] The court's statement enunciates *the subjective test of danger,* which requires that knowledge of the normal and probable consequences of his act must be attributed to an insured. (*Cf. Mullaney v. Prudential Ins. Co.,* 5 Cir., 125 F. 2d 900, 901.) Ground No. 8 was:

> "(8) That the evidence shows that Thompson, while going to the Telfer house, was aware of the danger of being shot by Corbett" (283.)

[7] A large number of cases in point on the accidental-means issues are briefly digested in an appendix, pp. 24-29, in our Brief in Support of Petition for Certiorari, *General American Life Ins. Co. v. Central Nat. Bank of Cleveland, Trustee,* cert. den. 308 U. S. 605, October Term, 1939, No. 420.

Hill, 193 U. S. 551, 553; *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 136." (Emphasis ours.) (318.)

The differences between the six grounds for judgment n.o.v. and the three narrower issues which alone were previously passed upon are obvious upon consideration. For instance, assuming that the insured's *uncommunicated* purpose was only to have a "peaceful talk" with Corbett, nevertheless the insured could, and did, cause or bring about the dangerous situation (Ground No. 3 above), he presumably knew of the danger (No. 4), he placed himself in a dangerous situation (No. 5), and five reasonable persons actually foresaw that he was likely to be shot (No. 6). Any *one* of these would establish that the insured's death was not by accidental means, and would entitle defendant to judgment, even though the insured's secret purpose was only to have "a peaceful talk" under those conditions.

Again, suppose that neither the insured nor a reasonable man would have actually "*expected*" to be shot; yet that alone would not be decisive in favor of plaintiff. If the insured "brings about" the shooting by his misconduct or wrongful acts; or if he went there when he "would naturally be presumed to know" that he was "*likely*" to be injured; or if he "places himself in a position where it may be reasonably expected" that he would be injured; or if "a man of ordinary intelligence and prudence" would have foreseen that the shooting was likely to result from his going there; or if he was the aggressor in the situation; or if he was presumably "aware of the danger" he was needlessly incurring—then there could be no recovery, and the opinion of the Court of Appeals on the first appeal said so. Actual "expectation" of being shot—which would be the equivalent of an intention to commit suicide—would if present defeat recovery, but its absence would not alone justify recovery. It could be decisive *against* plaintiff but it could never be decisive *for* plaintiff; and in that sense it was a non-decisive issue, just like the peaceful-talk issue.

We shall not further discuss what the Court of Appeals did, and what it did not, decide with respect to the accidental-means issues on the first appeal since petitioner's brief fails to discuss, or even to note, those important qualifications thereof.

Before leaving that subject, however, we respectfully point out the complete inaccuracy of petitioner's representation that "the central question of the whole controversy is, 'Did Thompson come to his death accidentally; or did he practically commit suicide by walking into a known and reasonably certain fate?' " (Brief, 2.) A finding that the insured's death was by accidental *means* was not a necessary alternative to a failure to find that he intended to commit suicide, as petitioner suggests.

Since the first-appeal opinion of the Court of Appeals (May 10, 1939), the Supreme Court of Ohio in *Hassay v. Metropolitan Life Ins. Co.*, 140 O. S. 266, 271, has held that "the established rule in Ohio" is that—

> "• • • where one of his own volition follows an intended course of conduct, culminating in injury or death, the *result* may be accidental but not the *means*. In other words, an effect which ensues as a consequence of a purposed act is not produced by accidental means." (Emphasis ours.)

Even previous to the *Hassay* case, *supra*, it was recognized in the Sixth Circuit in *Pope v. Prudential Ins. Co.*, 29 F. 2d 185, 186, that "there is obviously a substantial distinction between an accidental result and the result of an accidental cause."

But in addition to assigning six grounds under the accidental-means question which were in accordance with and not foreclosed by the opinion of the Court of Appeals on the first appeal, respondent's motion for judgment n.o.v. assigned four issues under the violation of law question none of which had been passed upon by the District Court (Judge West) before the Court of Appeals, on the first appeal, reviewed his directed verdict. On the intermediate

remand to Judge Wilkin, he found not only the six accidental-means grounds well taken, but also found the four violation-of-law grounds well taken. (302, 307.)

4. Respondent's motion for judgment n.o.v. also assigned four grounds under the violation of law question, none of which were or could have been decided in the first-appeal opinion; and the District Court was therefore also empowered to grant that motion upon any one of such four grounds.

Petitioner nowhere in its petition or brief advises the Court that the extra indemnity is not payable "if the insured's death shall result * * * directly or indirectly, wholly or in part, * * * from *any violation of law* by the insured" (257), but on the contrary it represents at pages 1 and 2 of its petition that "the double indemnity (is) promised by the words of the policy, if the death of the insured should occur by 'external, violent and accidental means * * *'." Its omission to discuss this issue explicitly doubtless is due in part to Judge Wilkin's holding that "the undisputed evidence or established facts show that the insured at the time of his death was engaged in a violation of law (both the statutes of New Mexico and the fundamental principles of self-defense and defense of one's home * * *). (302, 287.)

The applicable provisions of the policy sued upon are set forth *supra,* at p. 2. The extra indemnity was payable under that policy only (1) if the insured's death resulted from accidental means and (2) if the insured's death did not result from any violation of law by the insured.

As heretofore stated (*supra,* 6), defendant's motion for directed verdict in the trial before Judge West was on both of those grounds, namely: (1) That death resulting from accidental means had not been shown and (2) that death resulting from violation of law by the insured had been shown.

Judge West passed only upon the accidental-means ground and, finding that ground alone sufficient to sustain the motion, *made no ruling upon the violation of law ground.* (9, 288.) Consequently, when the Court of Appeals heard the first appeal, which was based upon the directed verdict rendered by Judge West, there had been no ruling previously made by the District Court on the violation-of-law issues which the Court of Appeals *could* review.

The fundamental differences between the accidental-means issues and the violation of law issues are too obvious to require extended discussion. For example, Sec. 35-1506, New Mexico statutes, made it a crime to enter any house without the consent of the occupant. (74, 284.) Establishing those few facts alone are therefore sufficient to defeat plaintiff's claim, regardless and independent of the state of the case with respect to the accidental-means issues.

But in conjunction with other facts the violation of laws by the insured has a bearing on some of the accidental-means issues, *as such.* For instance, the Court of Appeals held on the first appeal that an insured's death is not by accidental means where his injury is brought about by his own wrongful act or misconduct or aggression. (12.) (Discussed further *supra*, at 23-24 *et seq.*) Consequently, such statutes are also relevant on the accidental-means issues, *as such*, on the questions of whether the insured's act was wrongful or whether it constituted misconduct or an aggression.

Petitioner now argues, from the fact that the opinion of the Court of Appeals on the first appeal contains a reference to "certain statutes of New Mexico" (14), as if that reference constituted actual decision and operated upon the re-trial to foreclose the District Court from entertaining a motion for directed verdict upon any of the violation of law issues, as such. (Brief, 11-12.)

There are several decisive answers against the position that the violation of law issues were so foreclosed.

In the first place, the historic function of appellate courts is to correct errors made by the trial court. Their function is not to rule in advance of an actual ruling made by the trial court for that would be the exercise of original jurisdiction, not of appellate jurisdiction. They review rulings actually made by trial courts, but do not in advance determine in a particular case how a trial court shall exercise a discretion vested in it which it has not yet exercised.

These limitations—appellate jurisdiction to review—are contained in 28 U. S. C. 225, which provides:

> "The circuit courts of appeal shall have *appellate* jurisdiction *to review* by appeal or writ of error final decisions— * * *."

The requirement that the District Court make a ruling upon a point before a Circuit Court of Appeals can review that ruling was stated in *Hecht v. Alfaro,* 9 Cir., 10 F. 2d 464, 466, as follows:

> "We can review only rulings made by the trial court on questions brought to its attention *and passed upon by it.*" (Emphasis ours.)

Accord: *General Motors Co. v. Swan Carburetor Co.,* 6 Cir., 44 F. 2d 24, 25; *Weinstein v. Laughlin,* 8 Cir., 21 F. 2d 740, 742.

It is therefore submitted that the Court of Appeals on the first appeal *could not,* in advance of a ruling thereon by the trial court, have foreclosed the District Court upon the re-trial of the case from directing a verdict for defendant upon the violation of law questions, *as separate issues,* if the District Court should find that the state of the evidence upon the re-trial required such directed verdict.

In the second place, a reading of the opinion of the Court of Appeals on the first appeal shows that the reference to "certain statutes of New Mexico" was in connection with the court's consideration of the accidental-means issues—*not* the separate and distinct provision as to violation of law. It said:

> "The insurer contends also that under certain statutes of New Mexico Thompson clearly was *the aggressor*. The District Court made no finding upon this point and apparently did not consider it. No decisions of the courts of New Mexico are cited. If these statutes apply, this contention also presents a question of fact which should have been submitted to the jury." (14.)

Bearing in mind that in the court's quotation from the applicable policy provisions, it deleted, and did not quote, the policy provisions pertaining to violation of law (11-12); that the entire opinion nowhere uses the language "violation of law"; that Judge West had not made any ruling on those issues which could be reviewed by it; that one of the questions earlier set forth in the court's opinion was whether the injury was "the result of misconduct or an aggression by the insured" (12),—and it becomes clear that the court was there considering whether Thompson "also * * * was the aggressor" *within the accidental-means issues* which the court had just been considering. To consider such statutes *in aid of the accidental-means issues,* on which issues they were relevant with respect to whether there was "misconduct or an aggression by the insured," is one thing. But it does not constitute a matter "in terms discussed and decided," within the meaning of *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551, 553, with respect to the *independent* and *separate* main issue of whether the insured's death resulted from his violation of criminal statutes.

In the third place, it is clear that the Court of Appeals itself did not consider that it had "in terms discussed and decided" those violation of law issues on the first appeal. In its opinion on the first hearing of the second appeal Judge Hicks, after earlier in the opinion setting forth that entire paragraph, which had been a subject of argument by both sides, said:

> "As indicated above, the gist of our former opinion was, that 'the case presents several questions of fact which required submission to the jury; * * *.' *The opinion went no further.* See *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551, 553; *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 136." (Emphasis ours.) (318.)

And the "several questions" referred to were all accidental-means questions and presented as such in the court's opinion. (11, 14.)

We do not feel called upon to discuss why the District Court was correct in ruling that all four of the New Mexico criminal statutes in question (72-74) were violated by the insured (287, 302, 308) for what petitioner attacks is not the correctness of the ruling made thereon but the right of the District Court and the right or consistency of the Court of Appeals in considering such four grounds of defendant's motion for judgment n.o.v. (284) as a basis for rendering final judgment for respondent.

Clearly the District Court had not only the *right* but also the *duty* to consider, on respondent's motion for judgment n.o.v., the effect of "the undisputed or established facts" (287) with reference to the violation of law questions; and respondent would have been deprived of the equivalent of a statutory right had the District Court not finally (302, 308) done so.

Beyond question (*supra,* 17 *et seq.*) the Court of Appeals on the second appeal had the *right* to consider the effect of the evidence upon the violation of law issues; and if its final judgment, rendered without opinion, was based in part upon any or all of those four violation-of-law issues, it was not thereby inconsistent with its first-appeal opinion, as heretofore shown. (*Supra,* 22 *et seq.*)

5. The final judgment in the Court of Appeals also could have been based upon the important differences between the third-trial evidence and the factual situation set forth in the first-appeal opinion of the Court of Appeals as the basis for its first decision; and the District Court was also entitled to take such differences into consideration.

The rule is usually stated that the reversal of a directed verdict given on one trial is not binding upon the re-trial where the evidence is substantially different. But the third-trial evidence was on several issues decisively different from the factual situation depicted in the first-appeal opinion. In short, *on vital points the factual situation there set forth does not exist on this record.*

For instance:

In the first-appeal opinion, Judge Allen said:

> "He (Thompson) endeavored to meet with Corbett and talk the matter over." (13.)

But this record shows the contrary; that several hours before the shooting Clinton P. Anderson, Corbett's employer, several times "urged" Thompson "to let him bring Corbett to the office" but the insured "expressed his impatience with the idea" and "expressed only going out to slap him (Corbett) until he saw the thing in the right light" (91); that when, just before the shooting, the insured telephoned Corbett to threaten him, Corbett had told him "I don't want to see you (Thompson) * * * if you want any conversation now you will have to take it with my attorney * * * Ralph Brown," to which the insured replied: "To hell with you and your attorney * * * I am coming out there and beat you up." (147.)

In the following part of Judge Allen's opinion, there were a number of points made which are not shown on the present record, namely:

> "He (Corbett) also states that he shot before any words were spoken, although he knew that Thompson was unarmed. The bullet which killed Thompson entered the left shoulder on the upper side and came out under the right arm. Appellant (plaintiff) contends that this indicated that he was shot from above, and not from a position facing Corbett." (13.)

That was the *heart* of the court's factual statement on the basis of which it reversed Judge West's directed verdict! Certainly nothing else in the court's factual statement could even have come close to justifying it. Yet, piece by piece, those points are not in accord with the present record!

The record shows that the time when Corbett first "knew" that the insured had not been armed was not until sometime *after* the shooting (189); that beforehand, since he did not even know where the insured was telephoning from, he had no possible means of knowing; that he in fact "had reason to think he would be armed." (187.)

Again, the first-appeal opinion, through some misapprehension, stated that "The bullet which killed Thompson entered the left shoulder on the upper side * * *." Now the place where the bullet entered the insured was vital for, in view of Corbett's testimony that he shot him in the chest when they were standing face to face, if the bullet had in fact entered the insured on the upper side of the left shoulder as the court stated, that would clearly disprove Corbett's testimony. To completely disprove that the present record shows that situation, we quote the following statement made during the trial by the third-trial court, Judge Wilkin:

> "It is agreed by counsel that the bullet *entered at the front,* below the shoulder, about three inches from the top of the shoulder * * * *In the chest,* yes." (119.)

Next, the opinion stated that the bullet "came out under the right arm." Plaintiff's own new deposition of the undertaker clarifies this, the undertaker testifying twice on

direct examination that the bullet came out "below the shoulder blade." (64.)

Next—and predicated upon those now disproved assumptions, that the bullet entered on top of the shoulder and came out under the right arm—the opinion indicated a measure of acceptance of the inference "that this indicated that he (the insured) was shot from above, and not from a position facing Corbett." The present record not only destroys those two facts but also destroys the conclusion suggested therefrom, that a bullet will necessarily follow a straight-line course through the body; the inference that by projecting a line backward from the point of exit, of a bullet from a body, through the point of entrance, the point where the bullet was fired from can be determined. The only expert testimony in the record on this matter is that of David Cowles, ballistic expert of the Cleveland Police Department, whose uncontradicted testimony was that you can't tell what a bullet will do after entering the body (204-206); that it "would be impossible" "to tell the direction from which a bullet has come, if you know the spot at which it has entered the body, and • • • the spot where it finally leaves the body." (202.)

We submit, therefore, that the failure of the present (third-trial) record to substantiate the described factual situation upon which the first-appeal opinion was predicated brought the third-trial record within the *proper* application of the rule that where the evidence is substantially different, the reversal of a directed verdict given on one trial does not preclude again directing a verdict upon the re-trial.

In its opinion on the *first* hearing of the second appeal, the Court of Appeals made no finding on that point, the vital differences between the factual situation on this record and that described in its first-appeal opinion, but noted at that time only that "Upon the third trial the evidence was in the main similar to that adduced at the second, with a

limited amount of additional evidence." (317.) But we have just pointed out the vital legal significance of that additional evidence. What the Court of Appeals finally concluded about the evidence when the case came on for *final* hearing of the second appeal, we do not, of course, know for it rendered no opinion. But the burden is not on respondent to show on what ground or grounds the Court of Appeals found in its favor, but only to point out the existence of a ground or grounds upon which the Court of Appeals *could* properly find for it. The ground just discussed, that the evidence upon the third trial disclosed a factual situation vitally different from that upon which the court's previous reversal was based, is an additional *proper* ground upon which its final decision could have been reached.

B.

THE DISTRICT COURT WAS NOT WITHOUT POWER AND AUTHORITY UPON THE INTERMEDIATE REMAND OF THE CASE TO IT TO CORRECT ITS FORMER ORDER, TO EXERCISE ITS DISCRETION UPON DEFENDANT'S MOTION FOR JUDGMENT N.O.V., AND TO RENDER FINAL JUDGMENT FOR DEFENDANT.

Petitioner's second main point is that when the Court of Appeals remanded the case to the District Court to correct its former ruling upon the new-trial branch of defendant's alternative motion and to exercise its independent judgment thereon, the District Court on such remand lacked power and authority to pass upon defendant's motion for judgment n.o.v. and to render final judgment for the defendant.

It did not lack such power. But assuming that the District Court did not have power to enter final judgment for defendant, nevertheless that would not establish that the Court of Appeals, which itself had authority to enter final judgment, committed reversible error.

1.

As heretofore stated, the mandate of the Court of Appeals upon that remand to the District Court is not in the present record.

2.

But assuming that petitioner is correct in saying that the District Court exceeded its power and authority in rendering final judgment for defendant, unquestionably the Court of Appeals had authority to render final judgment for defendant, even if the District Court did not. This the Court of Appeals has done. Its judgment necessarily superseded that of the District Court and was made independent of the order made by the District Court. Petitioner's claim of error is therefore misdirected for the setting aside of the order of the District Court would not relieve petitioner from the effect of the final judgment rendered against it by the Court of Appeals, the correctness of which, it is submitted, has just been shown. (*Supra*, 22-35.)

3.

But even if it be assumed that the mandate itself was in the usual form and in the terms indicated by the opinion, it by no means follows that the District Court was without power and authority upon the remand to pass upon defendant's motion for judgment and to render final judgment for defendant.

We have previously analyzed the grounds of defendant's motion for judgment n.o.v. (*Supra*, 22-35.) That motion assigned grounds which required the relief sought, if the trial court in the exercise of his discretion found the grounds well taken. Defendant was *entitled* to have the trial court exercise his discretion upon that motion for Rule 50(b) "contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented." *Montgomery Ward & Co. v. Duncan*,

311 U. S. 243, 251. Correspondingly, it was the *duty* of the trial court to exercise its discretion upon that motion.

When the District Court on the third trial passed upon defendant's alternative motion for judgment n.o.v. or for a new trial, through misapprehension of the scope of the opinion of the Court of Appeals on the first appeal the District Court mistakenly acted on the view that it had no authority to grant either motion on the grounds advanced; that it was precluded from considering such grounds by the first-appeal opinion of the Court of Appeals. (285-86, 287.) Consequently *its ruling, in a judicial sense, was the equivalent of no ruling at all.*

In *Fairmount Glass Works v. Coal Co.*, 287 U. S. 474, 482-483, it was said:

> "Under certain circumstances the appellate court may enquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox v. United States*, 146 U. S. 140; *Ogden v. United States*, 112 Fed. 523; or *if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced, Felton v. Spiro*, 78 Fed. 576, 581; *Dwyer v. United States*, 170 Fed. 160, 165; *Paine v. St. Paul Union Stockyards Co.*, 35 F. (2d) 624, 626-628." (Emphasis ours.)

And in *Davis v. Davis* (C. A., D. C.), 96 F. 2d 512, 514, it was stated:

> "Under such circumstances the applicable rule is set forth in *Seibert v. Minneapolis & St. L. Ry.*, 58 Minn. 58, 64, 57 N. W. 1068, 1070, as follows: 'It is elementary that if relief lying within the sound discretion of the trial court is refused on the ground of want of power to grant it, or upon any other ground that proves the nonexercise of that discretion, such decision will be reversed, and the case remanded, with a direction to exercise the discretion.' See, also,

Palliser v. Home Telephone Co., 170 Ala. 341, 54 So. 499; *Martin v. Bank of Fayetteville*, 131 N. C. 121, 42 S. E. 558."

"Consequently, the omission of the court to consider the matter presented by appellant in support of his petition constituted failure to exercise its discretion (*Mattox v. United States*, 146 U. S. 140, 147, 151, 13 S. Ct. 50, 36 L. Ed. 917), thus unfairly depriving him of his rights under the circumstances (*Pettegrew v. Pettegrew*, 128 Neb. 783, 788, 260 N. W. 287, 289; *Langnes v. Green*, 282 U. S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520); and requires that the cause be remanded 'for further proceedings from the point where the error was committed.' Taft, *J.*, in *Felton v. Spiro*, 6 Cir., 78 F. 576, 581, 583."

Since defendant had the *right* to have the District Court pass upon both branches of its alternative motion *at a time when he considered that he had authority to grant such motions for the reasons assigned* and since that right was not satisfied by the District Court's first ruling whereon he overruled such motions (289), it follows that after that ruling was made the defendant *still* had the right to such a ruling; and the District Court was *still* under the corresponding duty to so pass upon both motions.

The Court of Appeals, on the first hearing of the second appeal, recognized that defendant had such rights for in the opinion by Judge Hicks it was stated:

"*The District Court was required to rule* not only *upon the motion for judgment n.o.v.* but also upon the motion for a new trial." (Emphasis ours.) (317.)

"*It is apparent that the view of the lower court was that our former opinion required it* not only *to overrule the motion for judgment n.o.v.*, but the motion for a new trial as well. *This was erroneous.*" (Emphasis ours.) (318.)

Directing attention particularly to defendant's motion for new trial, Judge Hicks further said:

"Appellant was entitled to have the court pass upon the motion for a new trial in the exercise of its own independent judgment. *This it has not had.*" (Emphasis ours.) (319.)

And until the District Court did pass again upon the motion for new trial, disposition of the appeal by the Court of Appeals was suspended.

Judge Hicks said:

"For this purpose the case must be remanded, with directions to the court below to consider and act in its own discretion upon appellant's motion for a new trial, stating the reasons for his action. The result, whether one way or the other, may be certified to us in a supplemental record, and, along with other uncontroverted issues in the case, will be subject to review here under the procedure outlined in *Montgomery Ward & Co. v. Duncan, supra.* We are not unmindful that an appellate federal court will not ordinarily disturb the action of a district court upon a motion for a new trial for error of fact (*Paramount* [*Fairmount*] *Glass Works v. Coal Co.*, 287 U. S. 474, 481) but this is not true where the question involved is one of law.

"Remanded." (319.)

The opinion by Judge Hicks was not a final ruling with respect to defendant's motion, nor either branch thereof. It was, rather, preliminary to the making of such a ruling. The District Court, through misapprehension of the first-appeal opinion, had failed to exercise its independent judgment with respect to defendant's motion, and the case was remanded for further proceedings from the point where such error occurred.

The substance of the opinion by Judge Hicks was that the trial court had been under a misapprehension as to the scope of the court's previous opinion; that thereby the defendant had been deprived of its right to the independent judgment of the trial court; that the Court of Appeals opinion "went no further" (318) than to pass upon the three narrow accidental-means issues stated. It was implied

thereby that the District Court was free to exercise its discretion with respect to the violation of law issues and also the other accidental-means issues. Implicit also in a ruling by an appellate court that its previous ruling "went no further" than to rule upon "several" issues is a command to the lower court to perform its duty to pass upon all other issues. Indeed, if the mandate itself had been in the present record, it would have appeared that it included the following command:

> "You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

It was held in *Sprague v. Ticonic Bank*, 307 U. S. 161, 168:

> "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *Ex parte Century Indemnity Co.*, 305 U. S. 354."

Having in mind the general implied powers of the lower court upon a remand and the implied command referred to in this instance, is it to be assumed that the mandate in this case should be construed as depriving the trial court of power to act with respect to such "other issues"? (*Sprague v. Ticonic Bank, supra.*) The opinion did give "directions to the court below to consider and act in its own discretion upon appellant's motion for a new trial" (319); and it is true that it did not specifically direct the lower court with respect to passing upon the motion for judgment n.o.v., although doubtless it should have done so. But there was nothing in the court's opinion which *prevented* the trial court from correcting his ruling on the motion for judgment n.o.v. On those grounds alone, therefore, we controvert petitioner's contention that the remand

was for a ruling "only" upon the motion for a new trial. (Brief, 4.)

In *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, after a judgment in a Circuit Court in favor of the assignee of a claim had been reversed for lack of diversity jurisdiction and remanded, the Circuit Court on defendant's motion rendered judgment in its favor for the amounts plaintiff had collected from defendant on the original judgment; and the question was whether the trial court had jurisdiction "to render judgment for restitution of the money collected on the reversed judgment." In holding that it did, it was stated by Mr. Justice Field:

> "But here the jurisdiction exercised by the court below was only to correct by its own order, that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position. *Jurisdiction to correct what had been wrongfully done, must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.*" (Emphasis ours.)

Mr. Justice Brewer in a concurring opinion added:

> "I had supposed the law to be otherwise * * * But the result is so manifestly equitable I am glad to know that I was mistaken, and that the law is as it is now adjudged to be."

It is submitted, therefore, that Judge Wilkin also had inherent jurisdiction upon the remand to correct his former ruling upon the motion for judgment n.o.v. which was made by him at a time when he mistakenly assumed that he had no authority to grant such motion on the grounds assigned.

It is further submitted that the effect of remanding "the case" (319) to the District Court for proceedings from the point at which error had occurred operated to reinstate the proceedings in the trial court as of the date it originally passed upon defendant's alternative motion, at which date the District Court unquestionably had complete authority over defendant's alternative motion in both of its branches. *Cf. United States Trust Co. v. New Mexico,* 183 U. S. 535, 542, where Mr. Justice Brewer stated:

> "The reversal of the order of dismissal by this Court reinstated the proceeding in the trial court as of the date of the order of dismissal."

It is further submitted that revesting the trial court with jurisdiction to pass upon the motion for new trial operated to restore to the District Court its original authority in the case under the doctrine that orders and judgments of a trial court do not become final for purposes of appeal so long as a motion for new trial is pending in the trial court.

That doctrine has been many times recognized by the Court.

In *United States v. Ellicott,* 223 U. S. 524, 539, it was stated:

> "The general rule * * * treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of * * *"

In *Kingman v. Western Mfg. Co.,* 170 U. S. 675, 678, referring to disposition of a motion for new trial, it was stated:

> "Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

In *Memphis v. Brown,* 94 U. S. 715, 717-718, it was stated:

> "Under the ruling in *Brockett v. Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of."

Accord: *Leishman v. Associated Electric Co.*, 318 U. S. 189, 204; *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 36.

Under that doctrine also the District Court had authority to review its former order on defendant's alternative motion, and to correct its order thereon. And its action in doing so was not inconsistent with the appellate jurisdiction of the Court of Appeals but rather was in aid of that jurisdiction, for it was essential that the District Court exercise its discretion upon defendant's motion for judgment n.o.v. prior to the review thereof by the Court of Appeals.

Further, we submit that power to rule upon the motion for new trial necessarily carried with it power to rule upon the motion for judgment n.o.v., for disposition of the latter was necessary before ruling upon the motion for new trial, which was an alternative.

Defendant's alternative motion under Rule 50(b) of the Federal Rules of Civil Procedure was not primarily directed at obtaining only a new trial. The new trial was only secondary relief. It was asked for only if defendant was found not to be entitled to the primary relief asked for, which was granting of the motion for judgment n.o.v. Consequently, the power given to the District Court upon the remand to determine whether defendant was entitled to the secondary relief asked for necessarily carried with it power to determine whether that relief should be given to defendant *as secondary relief*. Since it had power to give that *as* secondary relief, it therefore had power to make the orders necessary so that such relief would be secondary only and operate only if the primary relief, namely, final

judgment for defendant, should be set aside on appeal. Exercise of power over the motion for judgment n.o.v. was therefore necessary to complete exercise of power over the motion for new trial.

In *Allegheny County v. Maryland Casualty Co.*, 3 Cir., 132 F. 2d 894, 896, cert. den. 318 U. S. 787, it was pointed out:

> "For it is settled that the granting of a new trial has the effect of vacating an existing judgment in the cause. *United States v. Ayres*, 1869, 9 Wall. 608, 76 U. S. 608, 19 L. Ed. 625, 627; *United States v. Young*, 1876, 94 U. S. 258, 24 L. Ed. 153. A subsisting order that the issues be tried again is obviously inconsistent with the continued existence of a judgment settling those issues. As the Supreme Court of Pennsylvania said in *March v. Philadelphia & West Chester Trac. Co.*, 1926, 285 Pa. 413, 416, 132 A. 355, 356, '* * * a new trial and a judgment cannot be in effect at the same time in the same case.' It follows that the granting of a new trial sets aside both the verdict and the judgment entered upon it without any specific mention of either."

We respectfully wish to suggest consideration of the actual situation before Judge Wilkin upon the remand. He had determined that plaintiff had no case and that "it would be futile to order a new trial." (302.) Having so determined, what was he to do?

In the first place, in order to grant even the motion for new trial—which it is undisputed he had authority to do—he had to set aside the former verdict and judgment for plaintiff, for a judgment in favor of plaintiff and an unconditional order of new trial can not exist at the same time. *Allegheny County v. Maryland Casualty Co., supra.*

Next, Judge Wilkin had to vacate and set aside his former order overruling defendant's alternative motion. That order was one order. Was he to vacate part of that order but to leave the other part untouched? Was his final ruling on the alternative motion to be, on one hand,

that plaintiff was entitled to final judgment but, on the other hand, that defendant was entitled to a new trial? He certainly was not in that incongruous position when the alternative motion was first presented to him. Nor had the Court of Appeals on the first hearing ruled that he had properly ruled upon the motion for judgment n.o.v. previously. Clearly, therefore, his decision to correct in its entirety his former order with respect to the alternative motion, and to make his order conform to his finding that plaintiff had no case, was, it is submitted, correct.

C.

THE COURT OF APPEALS HAD POWER TO RENDER THE FINAL JUDGMENT FOR DEFENDANT WHICH IT DID RENDER, EVEN IF IT IS ASSUMED THAT THE DISTRICT COURT WAS NOT EMPOWERED TO RENDER FINAL JUDGMENT UPON THE INTERMEDIATE REMAND.

Petitioner's third and last main point is not set forth with explicitness in its brief. It appears to be the contention that if the District Court lacked power on the intermediate remand to enter judgment for defendant, then the action of the Court of Appeals in rendering final judgment for the defendant on the final hearing of the second appeal was erroneous and should be reversed.

That contention is wholly without merit.

We have just discussed the numerous grounds upon which the District Court was empowered to and justified in entering the judgment for the defendant which the District Court did enter. (*Supra*, 36-46.) For the reasons stated, it is submitted that that action of the District Court was correct.

But even if it is assumed that the District Court did commit error, as claimed by petitioner, that would not establish that the final judgment of the Court of Appeals in favor of the defendant constituted reversible error.

Where a District Court makes a ruling which erroneously denies a motion for judgment n.o.v. the Court of

Appeals is empowered, instead of remanding to the District Court, to itself find in favor of the motioner and to enter judgment n.o.v. Thus in *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 253-254, it was held:

> "If he (the District Court) denies a judgment n.o.v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment n.o.v. and errors of law in the trial, as heretofore. *The appellate court may* reverse the former action and *itself enter judgment n.o.v.* or it may reverse and remand for a new trial for errors of law." (Emphasis ours.)

If the Court of Appeals was empowered itself to enter judgment n.o.v. for defendant upon the *first* hearing of the second appeal in the Court of Appeals, *a fortiori*, it was empowered to do so on the second hearing of the appeal. That jurisdiction on the second hearing of the second appeal was not lost even if the District Court made an erroneous ruling on the motion for judgment n.o.v. during the intermediate remand. If on the final hearing of the second appeal the Court of Appeals concluded that the District Court did err as claimed by petitioner, it might have remanded the case again; but it also could, and did, settle the whole thing on that hearing by itself rendering the proper judgment.

Petitioner asserts that the final judgment of the Court of Appeals rested "solely upon the basis of the * * * action of the District Court." (Brief, 5.) But the record does not show that to be true. Instead, the recitations in the judgment of the Court of Appeals show that it found "that there is no reversible error in the action of the (district) court in vacating and setting aside the judgment appealed from." (320) That was just what it was stated to be, an affirmance of the action of the District Court in vacating the judgment for plaintiff.

Next, and without in form setting it forth as an affirmance of the District Court in rendering judgment n.o.v.

for defendant, but reaching the same result, the Court of Appeals, independently of what the District Court had done on the motion for judgment n.o.v., itself rendered final judgment for defendant by concluding its judgment with the following order:

> "IT IS THEREFORE ORDERED AND ADJUDGED, that the judgment for plaintiff be and the same is reversed and the case remanded with directions to the District Court to dismiss the action." (320)

Under Rule 41(b), Federal Rules of Civil Procedure, that dismissal, when made by the District Court, "operates as an adjudication upon the merits.[1]"

Petitioner refers to the manner in which, in the recitations part of its order, the Court of Appeals "characterizes the action of the District Court," and argues therefrom that "the Circuit Court of Appeals seems to recognize that the only valid and effective act of the District Court was the granting of the new trial." (Brief, 15.) If petitioner had ventured to file an application for rehearing in the Court of Appeals doubtless this would have been immediately cleared up, if necessary. But when petitioner had that opportunity to file such application it did not avail itself of it, but chose instead to raise that point for the first time in this Court.

But even assuming petitioner's above contention is well taken, that the Court of Appeals did not recognize the final judgment for defendant rendered by the District

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[1] "b. *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *Unless the court in its order for dismissal otherwise specifies,* a dismissal under this subdivision and *any dismissal not provided for in this rule,* other than a dismissal for lack of jurisdiction or for improper venue, *operates as an adjudication upon the merits.*"

Court as effective, it was not necessary for the Court of Appeals to do so in order, free of reversible error, to itself render final judgment effectively disposing of the litigation. Nor was it necessary for the Court of Appeals, before rendering final judgment, to review its two previous opinions and to point out on which of the unusually numerous available grounds it considered that defendant was entitled to final judgment in its favor.

CONCLUSION.

In conclusion, two District Judges have been unequivocally convinced that plaintiff has no case upon the application of the law to the facts. The District Judge in the trial from which these proceedings arise found that to be true on ten specific grounds.

The Court of Appeals on the first appeal, when it reviewed the directed verdict rendered in the second trial, passed on only a few of the numerous issues presented and on the basis of those few issues alone, and without deciding other issues, remanded for a new trial. But fractional proof of a case is not enough. Even to establish firmly some elements of recovery is not sufficient where a plaintiff completely fails on other elements of the case upon which it must prevail in order to recover.

This appeal presented many new issues. It presented six issues on accidental-means questions which were not previously decided. It presented four new issues on the violation of law questions which were not, and could not have been, passed upon by the Court of Appeals in the first appeal. It presented a factual situation which on vital points was substantially different from the factual situation depicted in the first-appeal opinion. Upon any one of those numerous grounds, which depend on an appreciation of the evidence, the Court of Appeals was justified in rendering final judgment for the defendant.

The final judgment in the Court of Appeals is not inconsistent with its opinion on the first appeal; but even if

it were it had power, after reviewing its previous decisio to reach an inconsistent result. And that it could do wit out rendering an opinion for the purpose of discussi and explaining its previous rulings and without setti forth on which of the many available grounds its acti was based.

For the petitioner to ask the jury to say that the i sured's death was by accidental means because obvious he did not *intend* to commit suicide, was one thing. expect a Federal court to sustain a verdict on such a bas is another. (See Brief of Petitioner, p. 2.)

It is the state of the evidence with respect to the r legal issues—not the false ones—that the Federal cou look to. And in examining that they do not permit specu tion "to do duty for probative facts" (*Galloway v. Unit States*, 319 U. S. 372, 392) but require that the evider "at least point to the essential fact." (*St. Louis-S Francisco Ry. Co. v. Mills*, 271 U. S. 344, 348.)

The Court of Appeals and the District Court ha each *twice* examined this (the third trial) record. T judgment of each of those courts is that plaintiff has case. Previously, on the first appeal (reviewing the seco trial), the Court of Appeals did not concur with the D trict Court in that judgment, but now it has done so. judgment is just and correct. It does not, it is submitt present any situation calling for the intercession of t Court.

It is therefore respectfully submitted that this case not a proper one for review by certiorari in this Cou and that the petition for a writ of certiorari should denied.

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